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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 586

CHARLES E. WILLIAMS, *Petitioner*

v.

HOT SHOPPES, INC. *Respondent*

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The Court of Appeals filed no opinion. The District Court adopted the following recommendation of the Pretrial Examiner (JA 14):

> "Upon consideration of plaintiff's motion to vacate the dismissal by the Clerk under Local Rule 13, the opposition thereto, and the entire record herein, and it appearing that plaintiff failed for more than six months to take any action looking to the prosecution of his claim, and the Examiner finding that plaintiff has failed to show

mistake, inadvertence, surprise or excusable neglect such as would justify reinstatement, it is this 5th day of November, 1965,

"RECOMMENDED That said motion to re-instate be denied."

JURISDICTION AND STATUTE INVOLVED

Jurisdiction and the Statute and rules involved are adequately set forth in the petition.

QUESTIONS PRESENTED

1. Did the pre-trial examiner of the United States District Court for the District of Columbia and the United States District Court for the District of Columbia abuse their discretion in refusing to reinstate petitioner's case, following his failure to abide by the rules of the District Court?

2. Was the United States Court of Appeals for the District of Columbia in error in refusing to reverse the decision of the District Court on a question involving:

(a) the local rules of the District Court.

(b) the discretion of the District Court.

STATEMENT OF THE CASE

The gist of Petitioner's case may fairly be summarized as follows:

On November 5, 1959, Petitioner entered a restaurant in Alexandria, Virginia. The restaurant manager "fearing prosecution and in an attempt to avoid it" refused to serve him. Further, Defendant's manager disavowed private prejudice on his part and on the part of defendant and said, in effect, he was excluding Petitioner only because of Virginia law and the custom and usage of the community. Petitioner's conclusion is that

> because the restaurant did what it did not of its own free will but because of pressure from the State, its actions were no longer private corporate actions but had somehow become actions of the State, unconstitutional under the Fourteenth Amendment and unlawful under 42 U.S.C. § 1983.

Having filed an Amended Complaint in June of 1961, Petitioner served interrogatories and requests for admissions on Respondent sporadically from June 15, 1961, to February 4, 1964. He followed this on July 13, 1964, with a Motion for Summary Judgment, moved to vacate an adverse ruling on that motion on October 23, 1964, and when that motion was denied, took no further action whatsoever until one year later when, on October 21, 1965, he moved to vacate the order of dismissal under Rule 13 of the Rules of the United States District Court for the District of Columbia.

Petitioner, a member of the Bar of all Courts concerned, has let this case creep along below for years, and the dismissal under Rule 13 of the Rules of the United States District Court for the District of Columbia was within the sound discretion of the District Court.

REASONS FOR DENYING THE PETITION

I

Petitioner Is an Experienced Attorney

Petitioner is an attorney with the Internal Revenue Service and has been since 1957 (JA 15). In the present case alone he has:

(1) filed a complaint;

(2) filed a brief opposing a motion to dismiss;

(3) filed and briefed an appeal to the U. S. Court of Appeals from the granting of that motion to dismiss;

(4) argued that appeal before a panel of the U. S. Court of Appeals twice;

(5) Argued that appeal before the U. S. Court of Appeals sitting en banc (110 U.S. App. D.C. 358, 293 F. 2d 835);

(6) filed an Amended Complaint;

(7) filed interrogatories;

(8) filed requests for admissions;

(9) taken depositions;

(10) filed motions to produce;

(11) opposed a motion for change of venue;

(12) moved to strike some defenses from Respondent's answer to the amended complaint;

(13) opposed a motion for summary judgment;

(14) moved for summary judgment;

(15) appealed to the U. S. Court of Appeals a second time in connection with a judgment entered against him on one of the two thrusts of his amended complaint;

(16) filed two petitions for certiorari with the Supreme Court of the United States;

(17) moved to vacate several orders entered below; and

(18) filed a mandamus with the U. S. Court of Appeals against Judge Walsh of the United States District Court.

Petitioner has also engaged in extensive litigation as a plaintiff-attorney in addition to the instant case and

to his duties with the Internal Revenue Service. In 1958, he filed a suit against Howard Johnson's in which he was counsel of record as well as Plaintiff. In that suit, Petitioner sought declaratory judgment and injunctive relief. He opposed a motion to dismiss and when it was granted, appealed to the United States Court of Appeals for the Fourth Circuit, and briefed and argued the case before that Court. *Williams* v. *Howard Johnson's Restaurant,* 268 F. 2d 845 (4th Cir., 1959).

When the Fourth Circuit ruled against Petitioner in that case, he again sued Howard Johnson's over a different, but similar, occurrence, this time in 1962 in the United States District Court for the District of Columbia. Upon motion for a change of venue that case was transferred to the United States District Court for the Eastern District of Virginia, Alexandria Division. There, the original complaint was twice amended (210 F. Supp. at 296). Then, as that Court later described it:

> "Pre-trial depositions were taken, interrogatories were propounded and requests for admissions were filed and answered by the respective parties. A pre-trial conference * * * was held at the request of the plaintiff." *Williams* v. *Howerd Johnson's Inc. of Washington,* 210 F. Supp. 295, 296.

The defendant then moved to dismiss and plaintiff moved for summary judgment. There was a hearing on the merits during which Petitioner successfully offered into evidence admissions he had secured prior to the hearing, 210 F. Supp. at 296. The Court then ruled against Petitioner on the merits.[1]

---

[1] In that case, Petitioner's theory was precisely the same as it is in the present case.

Petitioner then took that case[2] to the Fourth Circuit, where he again acted as his own counsel, 323 F. 2d 102 (1963). That Court remanded the case to District Court for a further hearing. A hearing below took place on April 1, 1964, and Petitioner again appealed to the Fourth Circuit, 342 F. 2d 727 (1965). In addition, during the last remand to the District Court in Virginia, Petitioner filed with the Fourth Circuit a mandamus against Judge Lewis. *Williams* v. *Lewis,* 342 F. 2d 727 (1965). This grew out of an attempt by Petitioner to amend, for a third time, his Complaint then before that Court. Then:

> "The District Court determined that, under the recited circumstances, the plaintiff's conduct in attempting further amendment was an abuse of the court's process and called for the visitation of sanctions upon the plaintiff, who is himself an attorney. The Court referred to our decision in Gullo v. Hirst, 332 F. 2d 178 (4th Cir., 1964), and to certain statements therein, ordered the plaintiff to pay to the court, within seven days, the sum of $100.00 and directed that counsel fees of $100.00 be taxed against plaintiff for defendant's counsel as a part of the costs assessed against plaintiff." (342 F. 2d 730).

The Fourth Circuit vacated these sanctions, even though:

> " * * * plaintiff's conduct of this litigation was such as to sorely try the patience of any court." (342 F. 2d at 730).

Petitioner then petitioned the Fourth Circuit for rehearing, and this was denied. (Vol. XXXII, Shep-

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[2] The two Howard Johnson cases involved two different alleged refusals to serve on two different dates.

hard's Federal Reporter Citations, No. 4, Feb. 1966, under 342 F. 2d 727).

There is another relevant bit of history in connection with this case. At one time in the present litigation, Petitioner was assisted by Phineas Indritz, Esq., a long-time member of this Bar. On September 19, 1960, Petitioner wrote the following letter to the Clerk of the United States Court of Appeals for the District of Columiba Circuit:

> "In re: Williams v. Hot Shoppes, Inc. No. 15,610
>
> "Dear Mr. Stewart:
>
> "This refers to the letter addressed to you by Phineas Indritz, Esquire, as 'Counsel for Appellant,' under date of September 16, 1960, rgarding a motion filed by me on September 14, 1960, in the above-entitled case.
>
> "This is to advise that Mr. Indritz was never employed by me as counsel at any stage in the prosecution of this case. I entered my appearance as appellant pro se counsel at the time the appeal was docketed and have been in charge of the litigation since it was commenced in District Court.
>
> "Mr. Indritz volunteered his services, has assisted me in the prosecution of this case, and was listed on the briefs filed herein as 'Of Counsel'. My understanding of the term, 'Of Counsel' is one who is employed to 'assist' in the litigation of a cause of action, 'or its presentation on appeal, but who is not the principal attorney of record for the party.' BLACK'S LAW DICT. (4th ed.) If Mr. Indritz entered an appearance as anything other than 'Of Counsel', the record is in error.
>
> "I regret that Mr. Indritz found it necessary to object to the motion filed by me since it consisted

merely of a request to file citations in support of oral arguments previously made by me before the Court.

"Very truly yours,

"/s/ CHARLES E. WILLIAMS.

"cc to:

Mr. Indritz
Mr. Steele
Mr. Carmody"

The sending of this letter apparently ended the participation of Mr. Indritz in this case.

Respondent respectfully submits that the following facts appear from the above recitation:

1. Petitioner is not a layman, but an experienced attorney and member of the Bar.

2. He filed three pro se suits in Federal District Courts in two different jurisdictions in the years 1958 and 1959.

3. In these suits, Petitioner employed, and showed familiarity with, practically every aspect of litigation in federal courts, including the filing of three complaints and at least three amended complaints; widespread discovery, including depositions, interrogatories, motions to produce and requests for admissions; oppositions to motions to dismiss complaints, motions for summary judgment, motions for change of venue, motions to strike interrogatories, and motions to dismiss appeal; appeals from final orders, interlocutory appeals, petitions for rehearings and petitions for certiorari; attempts to mandamus two different District Court judges; at least seven oral arguments before

District Court judges; five oral arguments before three judge panels of two different Appellate courts; and one oral argument before a nine-judge Court of Appeals sitting en banc.

4. Despite the fact that Petitioner had cases in litigation in two different federal court systems at the same time, he disassociated himself from Mr. Indritz, thus assuming the entire load of the instant litigation. *After* all this, he let one full year elapse, from October 1964 to October 1965, without doing *anything* in the instant case.

What we have here is an experienced lawyer who either wanted to delay the instant case in the hope some Supreme Court opinions would come down which would be helpful to him, (See Petitioner's brief, page 4, third full paragraph), or who, after flooding the District Court and the Court of Appeals with complaints, amended complaints, motions, appeals, etc., for just one month short of five years, then let a full year go by, without inquiry of any kind to the Clerk of the District Court and without doing anything whatsoever to advance the litigation.

Under these circumstances, Respondent submits that it just cannot be said that the Pre-Trial Examiner and the District Judge who adopted the recommendations of the Pre-Trial Examiner, abused their discretion in dismissing the case under Rule 13 and in refusing to re-instate it.

II

The District Court Had the Power To Dismiss the Case, and Did Not Abuse Its Discretion in so Doing

It is clear that a United States District Court has inherent power to dismiss an action for want of prosecution, whether under Local Rule 13 of the Rules of the District Court for the District of Columbia (or its equivalent,) or otherwise. *Slavitt* v. *Meader,* 107 U.S. App. D.C., 396, 278, F. 2d 276, and cases cited therein.

Petitioner must show an abuse of discretion by the Court below in order to merit a reversal. *Slavitt* v. *Meader, supra; Barger* v. *Baltimore & Ohio R. Co.,* 75 U.S. App. D.C. 367, 368, 130 F. 2d 401 (1942).

As stated at 24 Am. Jur. 2d, Dismissal, Discontinuance and Nonsuit, § 59:

> "In the absence of any statute or rule of Court guiding its action, the question is addressed to the sound judicial discretion of the trial court, whose ruling will not be disturbed in the absence of anything to indicate abuse of discretion in this respect."

In the instant case, where there is a clear rule of court, where the Petitioner is himself the attorney and a member of the Bar, and where the Petitioner allowed almost twice the time permitted in the rule to elapse, there is much less reason for disturbing the ruling of the trial court, and so the Court of Appeals decided in its action which Petitioner now seeks to review. As stated in *Steele* v. *General Baking Co.,* 101 A. 2d 845, 846, (D.C. Mun. Ct. of Appeals, 1954):

> "There is a duty on every plaintiff to be diligent in pursuing his remedies and to expedite his cause to a final determination."

In a case such as the present, where there is no innocent plaintiff to be hurt by his attorney's lack of diligence, the rule applies with greater force.

The truth of the matter is that the record discloses an experienced lawyer apparently working normal working hours as a government attorney and trying to conduct three involved pro se actions, in both trial and appellate courts, on the side, and getting rid of what Petitioner himself describes as "volunteer" help from another lawyer. Petitioner bit off more than he could chew. When in so doing he fails to abide by Court rules it does not add up to an abuse of discretion below if his action is dismissed, remembering always that it was an entire year which elapsed without *any* action by Petitioner.

III

There Is No Conflict in Circuits

There is no conflict of circuits involved in this case.

First, it is an abuse of discretion with which we are dealing. It is perfectly obvious that the discretion of the many District Court judges in the country is not identical, and when it varies, as it must, it does not add up to a conflict in circuits. When an abuse of discretion is involved each case must stand on its own facts. In the present case the sense of discretion of a pre-trial examiner, a District Court judge, and three judges of the United States Court of Appeals for the District of Columbia Circuit have all led them to conclude, unanimously, that Petitioner's failure to abide by the rules of court warranted the dismissal of his action.

Secondly, the cases cited by Petitioner in his brief certainly do not indicate a conflict in circuits. In

Woodham v. *American Cystoscope Co.*, 335 F. 2d 551 (4th Cir. 1964) cited by Petitioner at pages 5 and 6 of his brief, the following facts appear:

1. The plaintiff was not herself an experienced member of the bar. (at 552).

2. The plaintiff's attorney was not a member of the bar of the Court where the case was tried, but was a lawyer from another State (at 553).

3. The District Court gave as its main reason for dismissal the failure of counsel to comply with an impossible condition. As stated by the Court of Appeals (553):

> "In its order, the court referred to the violation of *another* local rule, Rule 20(a) as the 'primary' reason for denying the motion:
>
> " 'This Court is denying the motion to set aside said Order of Dismissal, *primarily because of the continued violation by plaintiff's counsel of Local Rule 20(a) of this Court, which requires counsel to perfect service on defendants within sixty (60) days from the date of filing.* This action was filed March 13, 1963, and now almost ninety (90) days after that date service has not been perfected upon American Cystoscope Makers, Inc. (erroneously named by plaintiff as The American Cystoscope Company of Pelham, N. Y.).'
>
> "We observe, in passing, that the plaintiff's counsel could not perfect service until reinstatement of the complaint."

4. The Woodham case *specifically* was not dismissed for want of prosecution or its equivalent. See 335 F. 2d at 556.

None of these factors is present in the instant case where

1. The Petitioner is an experienced lawyer.

2. The Petitioner is a member of the bar of the court whose rule is involved.

3. There were no impossible conditions for Petitioner to comply with.

4. The case was dismissed because Petitioner allowed one full year to elapse without taking any steps whatsoever.

These same important distinctions also distinguish this case from others cited by Petitioner.

L. P. Steuart, Inc. v. *Matthews,* 117 U.S. App. D.C. 279, 329 F. 2d 234, Cert. denied, 379 U.S. 824 (1964) cited by Petitioner at Page 7 of his brief, is a case in which the Court of Appeals *upheld* the discretion of the lower Court, not reversed it. This case stands for the proposition that an Appellate Court will not lightly overrule a trial court on a matter such as this which is committed to the discretion of the trial court.

IV

There Is No Innocent Litigant Involved Here

In many cases, some of which are cited by Petitioner, cases have been reinstated because courts were reluctant to impute the negligence of an attorney to the litigant. See for example, *L. P. Steuart, Inc.* v. *Matthews, supra.* In the present case, there is no innocent client to suffer because his lawyer did nothing for a year. Lawyer and client are one and the same. In a matter such as this, involving the discretion of the trial court,

the fact that Petitioner is an exprienced lawyer is surely a factor to which the courts below were entitled to give great weight.

V

Fact Petitioner Tried To Conduct This Litigation in His "Spare Time" No Excuse

Petitioner, in his Affidavit filed below and generally throughout this case, blames his heavy schedule of litigation

> ("* * * the plaintiff has for the past several years maintained one of the heavier dockets of cases in the Refund Litigation Division of the Chief Counsel's Office. Secondly, the plaintiff concentrated during *spare* time upon the prosecution of [his] Howard Johnson's case," (JA 16)). (Emphasis added.)

and the press of personal affairs for his inactivity. A similar contention was made, and rejected, in *Darlington* v. *Studebaker-Packard Corporation,* 261 F. 2d 903 (7th Cir. 1959). In that case, counsel had a heavy burden of work, so that even if he had not overlooked the local equivalent of our Rule 13, "it would not have been possible anyhow to take such action within said time." The Court of Appeals rejected this argument saying it did not provide a basis for holding the trial court had abused its discretion in denying a motion to reinstate. The hard truth of the matter is that it is extremely difficult, if not impossible, to conduct litigation in two different jurisdictions on the side, or as Petitioner puts it in his affidavit, during "spare time." When one attempts it in his "spare time," it is hardly an abuse of discretion for the court to insist that its reasonable rules be obeyed.

VI

CONCLUSION

In view of Petitioner's experience in Court as a member of the Bar, his undisputed failure to follow the rules of Court, and the fact that he let one full year go by without taking any action in this case, it was not an abuse of discretion for the District Court to dismiss the case and to deny a motion to reinstate it. Petitioner's brief presents no conflict in Circuits, as set forth above. Respondent, therefore, requests the Petition for a Writ of Certiorari be denied.

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